

No. 10988

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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DETWEILER BROS., INC., a Corporation,  
Appellant,

vs.

L. METCALFE WALLING, Administrator of the  
Wage and Hour Division, United States  
Department of Labor,  
Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the District of Idaho  
Southern Division

**FILED**

APR 3 - 1945

**PAUL P. O'BRIEN,**  
CLERK



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Circuit Court of Appeals

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Southern Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF  
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402 Federal Building,  
Boise, Idaho

Attorneys for Appellee. [2\*]

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court  
for the District of Idaho,  
Southern Division

No. 2301

L. METCALF WALLING, ADMINISTRATOR  
of the WAGE AND HOUR DIVISION,  
UNITED STATES DEPARTMENT OF LA-  
BOR

Petitioner,

vs.

DETWEILER BROS., INC., a corporation,  
Respondent.

APPLICATION TO COMPEL RESPONDENT  
TO ATTEND, TESTIFY AND PRODUCE  
DOCUMENTARY EVIDENCE.

L. Metcalfe Walling, Administrator, Wage and Hour Division, United States Department of Labor, pursuant to the Fair Labor Standards Act of 1938 (c.-676, 52 Stat. 1060, 29 U.S.C., sec. 201), hereinafter referred to as the Act, respectfully applies to this Honorable Court for an order directing Detweiler Bros., Inc., the respondent herein, to appear before him or such representatives as he may designate and to produce documentary evidence and to give testimony, as required by a subpoena duces tecum issued to it, as set forth herein, and as reasons therefor shows the Court:

## I.

The petitioner, L. Metcalfe Walling, hereinafter referred to as the Administrator, is the Administrator of the Wage and Hour Division, United States Department of Labor. The Administrator, or his designated representatives, are empowered by virtue of Section 11(a) of the Act to investigate, enter and inspect places and records (and make such transcriptions thereof) as he may deem necessary or appropriate to determine whether any person has violated any provision of the Act, or which may aid in the enforcement of the provisions of the Act. By virtue of Section 9 of the Act, the provisions of Sections 9 and 10 of the Federal Trade Commission Act of September 26, 1914, as [3] amended, U. S. C. Title 15, Secs. 49 and 50 (relating to the attendance of witnesses and the production of books, papers and documents), are made applicable to the jurisdiction, powers and duties of the Administrator, and the Administrator has the power to issue and cause to be served upon any person a subpoena requiring the attendance and testimony of witnesses and the production of all documentary evidence relating to any matter under investigation.

## II.

Jurisdiction to issue the order herein prayed for is conferred upon this Court by virtue of Section 9 of the Federal Trade Commission Act (made applicable by Section 9 of the Act, as stated above), which empowers any of the district courts of the United States within the jurisdiction of which an investigation is carried on, in case of refusal to

obey a subpoena to any corporation, or other person, to issue an order requiring such corporation, or other person, to appear or produce documentary evidence. The investigation, in the course of which the subpoena duces tecum was issued by the Administrator and served upon the respondent, is being carried on in the Southern Division of the District of Idaho, within the jurisdiction of this Court.

### III.

At all times hereinafter referred to, respondent was and is a corporation organized and existing under and by virtue of the laws of the State of Idaho, having its principal office and place of business at 144 Second Avenue, North, Twin Falls, Idaho, within the jurisdiction of this Court.

### IV.

Upon information and belief: C. H. Detweiler, at all times herein mentioned, was and is an officer of respondent, to wit: its president.

### V.

Upon information and belief: Respondent is engaged in the business of purchasing, manufacturing, producing, sell- [4] ing, installing, and shipping plumbing, sheet metal, and heating supplies, and in connection with such purchase, manufacture, production, sale, installation, and shipment, is engaged in the production of goods for interstate commerce, and is engaged in interstate commerce within the meaning of the Fair Labor Standards Act of 1938.

## VI.

Since October, 1940, petitioner, having reasonable grounds for believing that respondent was violating Sections 7, 11(c), 5(a)(2), and 15(a)(5) of the Act, sought through Elbert Shaw, Clifford C. Wills, Howard E. Hilbun, and Adrian Roberts, his duly authorized representatives, to make an investigation of respondent's business pursuant to Section 11(a) of the Act. At various times since October, 1940, and in connection with such investigations, Messrs. Shaw, Wills, Hilbun, and Roberts requested respondent, and one of its attorneys, Eli A. Weston, to permit them on behalf of the petitioner to inspect respondent's books and records. At all times respondent refused to permit such inspection as appears more fully from the affidavits of said Elbert Shaw, Clifford C. Wills, Howard E. Hilbun, and Adrian Roberts, attached hereto, marked Exhibit "A", Exhibit "B", Exhibit "C", and Exhibit "D", respectively, and by reference incorporated herein.

## VII.

A subpoena duces tecum was duly issued and signed by said Administrator, requiring respondent to appear before Howard E. Hilbun, Clifford C. Wills, and Karl M. Rodman, officers of the Wage and Hour Division, United States Department of Labor, designated therein at the Rogerson Hotel, in the City of Twin Falls, State of Idaho, on the 18th day of August, 1944, at 10:00 o'clock in the forenoon of that date, and to produce specific books, papers, documents, and records. Said subpoena

duces tecum was duly served upon respondents by delivering a duplicate original copy thereof to C. H. Detweiler, president of respondent, at its place of business, at Twin Falls, Idaho, [5] on July 28, 1944. A copy of said subpoena duces tecum, with the return thereof, is annexed hereto and marked Exhibit "E" and made a part hereof.

### VIII.

Upon information and belief: At all times herein stated the said C. H. Detweiler, as an officer of respondent, had and has custody and control of the books, papers, documents, and records described in said subpoena duces tecum.

### IX.

At 10:00 A.M., on the 18th day of August, 1944, Howard E. Hilbun, an officer of the Wage and Hour Division, designated in said subpoena duces tecum, was present at the Rogerson Hotel, in the City of Twin Falls, State of Idaho, for the purpose of examining the books, papers, documents, and records, production of which was required by the said subpoena, but respondent failed and refused to place before the said officer, or to produce the said books, papers, documents, and records, although one of respondent's attorneys, R. H. Parry of Twin Falls, Idaho, appeared at the said time and place to state that respondent would not produce the said books, papers, documents, and records required by the subpoena, as is more fully set forth in the affidavit of said Howard E. Hilbun, annexed hereto, and marked Exhibit "C", and made a part hereof.



## X.

All of the books, records, papers, documents, and memoranda required to be produced by said subpoena were at the time of the issuance of said subpoena, and are now, relevant, material and appropriate to determine whether respondent has violated Sections 6, 7, 11(c), 15(a)(2), and 15(a)(5) of the Act and will aid in the enforcement of the provisions of the Act.

## XI.

The books, records, papers, documents, and memoranda required to be produced by said subpoena were at the time of the issuance and service of said subpoena, and are now, in the [6] possession, custody and control of respondent.

## XII.

The refusal of respondent to appear before said officers and there produce the papers, books and documents required by said subpoena *duces tecum* has impeded and continues to impede said investigation.

## XIII.

No previous application has been made for the relief requested herein.

Wherefore, petitioner respectfully prays:

(a) That an order to show cause issue forthwith directing respondent to appear before this Court upon a day certain and show cause, if any it has, why an order should not issue requiring respondent to appear before petitioner, or one of the officers designated by him, at such time and place as the

Court may order, and there to produce the documentary evidence and to give evidence as required by said subpoena duces tecum.

(b) That upon return of said order to show cause, an order issue requiring respondent to appear before petitioner, or one of the officers designated by him, at such time and place as this Court may order, and there to produce the documentary evidence and to give evidence as required by said subpoena duces tecum.

(c) That the petitioner have such other and further relief as may be necessary or appropriate.

DOUGLAS B. MAGGS

Solicitor

ARCHIBALD COX

Associate Solicitor

DOROTHY WILLIAMS

Regional Attorney

Post Office Address: c/o Wage and Hour Division,  
U.S. Court House, Old, Portland, 4, Oregon. or:

[7]

c/o Wage and Hour Division, U.S. Department of  
Labor, 402 Federal Building, Boise, Idaho

KARL M. RODMAN

Attorney United States De-  
partment of Labor, Attor-  
neys for Petitioner

State of Idaho

County of Ada—ss.

Howard E. Hilbun, being first duly sworn, de-  
poses and says:

That he is a senior inspector for the Wage and



Hour Division, United States Department of Labor; that he has read the foregoing application for an order of this Court and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

HOWARD E. HILBUN

Sworn and subscribed to before me this 6th day of October, 1944.

[Seal] F. JOS. KEENAN

Notary Public in and for the County of Ada, State of Idaho. Comm. Expires 9-27-47. [8]

### EXHIBIT "A"

#### AFFIDAVIT OF ELBERT SHAW

State of Idaho,  
County of Ada—ss.

Elbert Shaw, being duly sworn, deposes and says:

I am a resident of Boise, County of Ada, State of Idaho. I am an Inspector in the Wage and Hour Division, United States Department of Labor, stationed in Boise, Idaho.

On May 12, 1943, accompanied by Inspector Clifford C. Wills of the Boise office of the Wage and Hour Division, United States Department of Labor, I called at the office of Detweiler Bros., Inc. at 144 Second Avenue, North, Twin Falls, Idaho, and asked permission of Mr. Skinner, Office Manager of the company, to examine the company's records relating to interstate purchases, shipments, and records of hours worked and wages paid the company's

employees, for the purpose of an investigation under the Fair Labor Standards Act.

Mr. Skinner procured these records and granted us permission to examine them. As we began to examine the records, Mr. C. H. Detweiler, President of the company, returned to the office and ordered the examination of the records discontinued and this order was complied with.

Whereupon a conference was held, in which Mr. C. H. Detweiler, Mr. R. P. Parry, one of the company's attorneys, Inspector Clifford C. Wills, and I participated. Mr. Parry stated that the company was convinced that it was entitled to the exemption provided by Section 12(a)(2) of the Fair Labor Standards Act, and that, therefore, the company would refuse to permit an examination of its records.

On May 21, 1943, accompanied by Inspector Clifford C. Wills, I again called at the office of Detweiler Bros., Inc. at 144 Second Avenue, North, Twin Falls, Idaho, and requested access to the company's records. Mr. Detweiler, President of the company, refused to permit us to examine the records and [9] stated that the entire matter had been referred to Eli A. Weston, attorney at law at Boise, Idaho, and that any further negotiations would have to be carried on with Mr. Weston.

Following Mr. C. H. Detweiler's directions Inspector Clifford C. Wills and I wrote a letter, dated May 24, 1943, addressed to Mr. Weston, requesting permission to examine the records of Detweiler Bros., Inc. Mr. Weston replied to our letter by

letter dated June 7, 1943, addressed to Inspector Wills, in which he stated that his (Mr. Weston's) letter constituted our authority to inspect the sales invoices and accounts receivable for a representative period of at least twelve months and to inspect the payroll records of Detweiler Bros., Inc. from such date as we desired to designate. Mr. Weston indicated that a copy of his letter was being sent to Detweiler Bros., Inc. Copies of the letters referred to above, sent by Inspector Wills and myself and reply received from Mr. Weston, are attached to this affidavit and are incorporated herein by reference.

Pursuant to Mr. Weston's letter of June 7, 1943, Inspector Wills and I made four attempts to contact Mr. C. H. Detweiler without success, during the period from June 7, 1943 to November 23, 1943.

On November 24, 1943, I again called at the office of Detweiler Bros., Inc., 144 Second Avenue, North, Twin Falls, Idaho, and asked Mr. C. H. Detweiler for permission to examine the company's records. Mr. Detweiler refused to permit me to examine the records and stated he would permit such examination of the records only in the presence of Mr. Eli A. Weston. Whereupon, Mr. Detweiler, in my presence, telephoned Mr. Weston and an appointment was made for December 1, 1943 at the offices of the Detweiler Bros., Inc., Twin Falls, Idaho, at which time Mr. Weston would be present and Mr. Detweiler would permit the examination of the records.

ELBERT SHAW

Elbert Shaw [10]

Subscribed And Sworn To before me this 3 day  
of Oct., 1944.

[Seal]

HARRY W. POULSON

Notary Public in and for the County of Ada, State  
of Idaho. [11]

(Copy)

U. S. Department of Labor  
Wage and Hour and Public Contracts Divisions  
402 Federal Building  
Boise, Idaho  
May 24, 1943

Mr. Eli A. Weston, Attorney,  
Sonna Building,  
Boise, Idaho

Dear Sir:

This is to inform you that on May 12, 1943, Inspectors Clifford C. Wills and Elbert Shaw called at the establishment of Detweiler Bros., Inc., in Twin Falls, Idaho, for the purpose of conducting an inspection to determine the state of compliance with the provisions of the Fair Labor Standards Act of 1938.

Mr. C. H. Detweiler, president of the concern stated that in his opinion the operations were not subject to the provisions of the Act. The inspectors made known to Mr. Detweiler that it was in line of duty to ascertain from records the facts which would establish whether or not coverage did exist.

Mr. Detweiler then requested that we delay the inspection until he could confer with legal counsel. The inspectors readily agreed setting a tentative

date of May 15, 1943 for continuance of the investigation. Due to unforeseen delays it was impossible to keep this appointment and on May 21, 1943 the inspectors called again after Mr. Detweiler had been notified by letter dated May 19, 1943.

At this time the inspectors were advised that the case had been referred to you and that further negotiations should be handled directly with you. He refused to make available the records necessary for determining coverage and stated that said records would be made available only upon your recommendations.

In view of Mr. Detweiler's contention that he is operating a retail service establishment and is entitled to the exemptions provided in Section 13(a)2 of the Act, it will be necessary for us to inspect sales invoices and accounts receivable for a representative period of at least 12 months and payroll records from October 24, 1938 to the present date.

At this point in the investigation it is impossible to state the exact records necessary to establish the facts in the case and it is imperative that we be immediately advised as to your intentions regarding the making available of such records as may be deemed necessary.

Very truly yours,

CLIFFORD C. WILLS

ELBERT SHAW

Inspectors [12]

(Copy)

Eli A. Weston  
Attorney at Law  
Boise, Idaho.

June 7, 1943.

Mr. Clifford C. Wills, Inspector  
Wage and Hour Division  
Federal Building  
Boise, Idaho

Dear Mr. Wills:

I apologize for not answering yours of the 24th before this. I, frankly, had expected to talk with you and with Mr. Detweiler in an effort to straighten out this case, without further inspection, but we seem to be quite far apart in our views and a further inspection will probably be necessary.

You have asked for permission to review the records of the Detweiler Brothers, Inc., for the purpose of determining coverage under the Fair Labor Standards Act and, specifically, to inspect the sales invoices and accounts receivable for a representative period of at least twelve months; also, the entire pay roll record from October 24, 1938 to the present date.

I am of the opinion that you are entitled to examine these records and for the purpose you specify. I wonder, however, if it is necessary to go clear back to October 24, 1938, as I understand you adopted a policy some time ago of going back only to some date in 1940, I believe it was August.



You may take this letter as your authority to inspect the sales invoices and accounts receivable for a representative period of at least twelve months, and to inspect the pay roll records of the Detweiler Brothers, Inc., from such date as you desire to designate. I am sending a copy of this letter to Detweiler Brothers, Inc., in Twin Falls.

Very truly yours,

ELI A. WESTON /s/

EAW:p [13]

### EXHIBIT "B"

#### AFFIDAVIT OF CLIFFORD C. WILLS

State of Wyoming,

County of Teton—ss.

Clifford C. Wills, being duly sworn, deposes and says:

I am a resident of Jackson, County of Teton, State of Wyoming. I was, during the period and on the dates mentioned below, an Inspector in the Wage and Hour Division, United States Department of Labor, stationed in Boise, Idaho.

On May 12, 1943, accompanied by Inspector Elbert Shaw of the Boise office of the Wage and Hour Division, United States Department of Labor, I called at the office of Detweiler Bros., Inc. at 144 Second Avenue, North, Twin Falls, Idaho, and asked permission of Mr. Skinner, Office Manager of the company, to examine the company's records relating to interstate purchases, shipments, and records of hours worked and wages paid the com-

pany's employees, for the purpose of an investigation under the Fair Labor Standards Act.

Mr. Skinner procured these records and granted us permission to examine them. As we began to examine the records, Mr. C. H. Detweiler, President of the company, returned to the office and ordered the examination of the records discontinued and this order was complied with.

Whereupon a conference was held, in which Mr. C. H. Detweiler, Mr. R. P. Parry, one of the company's attorneys, Inspector Elbert Shaw, and I participated. Mr. Parry stated that the company was convinced that it was entitled to the exemption provided by Section 13(a) (2) of the Fair Labor Standards Act, and that, therefore, the company would refuse to permit an examination of its records.

On May 21, 1943, accompanied by Inspector Elbert Shaw, I again called at the office of Detweiler Bros., Inc. at 144 Second Avenue, North, Twin Falls, Idaho, and requested access to the company's records. Mr. C. H. Detweiler, President of [14] the company, refused to permit us to examine the records and stated that the entire matter had been referred to Eli A. Weston, attorney at law at Boise, Idaho, and that any further negotiations would have to be carried on with Mr. Weston.

Following Mr. C. H. Detweiler's directions, Inspector Elbert Shaw and I wrote a letter, dated May 24, 1943, addressed to Mr. Weston, requesting permission to examine the records of Detweiler Bros., Inc. Mr. Weston replied to our letter by



letter dated June 7, 1943, addressed to me, in which he stated that his letter constituted our authority to inspect the sales invoices and accounts receivable for a representative period of at least twelve months and to inspect the payroll records of Detweiler Bros., Inc. from such date as we desired to designate. Mr. Weston indicated that a copy of his letter was being sent to Detweiler Bros., Inc. Copies of the letters referred to above, sent by Inspector Shaw and myself and reply received from Mr. Weston, are attached to this affidavit and are incorporated herein by reference.

Pursuant to Mr. Weston's letter of June 7, 1943, Inspector Shaw and I made four attempts to contact Mr. C. H. Detweiler without success, during the period from June 7, 1943 to November 23, 1943.

To keep the appointment made by Mr. C. H. Detweiler, President of the company, and Inspector Elbert Shaw for an examination of the company's records, to be made in the presence of Mr. Eli A. Weston, at the offices of the company in Twin Falls, Idaho, on December 1, 1943, accompanied by Senior Inspector Howard E. Hilbun of the Wage and Hour Division, United States Department of Labor, I called at the offices of the company on December 1, 1943 and again requested permission to examine the records of Detweiler Bros., Inc. of Mr. C. H. Detweiler, President of the company. These records were again refused us.

CLIFFORD C. WILLS

Clifford C. Wills [15]

Subscribed and Sworn To before me this 26 day of Sept., 1944.

[Seal] R. P. STEVENS

Notary Public in and for the County of Teton,  
State of Wyoming.

My commission expires July 14, 1945. [16]

(Copy)

U. S. Department of Labor  
Wage and Hour and Public Contracts Divisions  
402 Federal Building  
Boise, Idaho

May 24, 1943.

Mr. Eli A. Weston, Attorney,  
Sonna Building,  
Boise, Idaho.

Dear Sir:

This is to inform you that on May 12, 1943, Inspectors Clifford C. Wills and Elbert Shaw called at the establishment of Detweiler Bros., Inc., in Twin Falls, Idaho, for the purpose of conducting an inspection to determine the state of compliance with the provisions of the Fair Labor Standards Act of 1938.

Mr. C. H. Detweiler, president of the concern stated that in his opinion the operations were not subject to the provisions of the Act. The inspectors made known to Mr. Detweiler that it was in line of duty to ascertain from records the facts which would establish whether or not coverage did exist.

Mr. Detweiler then requested that we delay the inspection until he could confer with legal counsel. The inspectors readily agreed setting a tentative date of May 15, 1943 for continuance of the investigation. Due to unforeseen delays it was impossible to keep this appointment and on May 21, 1943 the inspectors called again after Mr. Detweiler had been notified by letter dated May 19, 1943.

At this time the inspectors were advised that the case had been referred to you and that further negotiations should be handled directly with you. He refused to make available the records necessary for determining coverage and stated that said records would be made available only upon your recommendations.

In view of Mr. Detweiler's contention that he is operating a retail service establishment and is entitled to the exemptions provided in Section 13 (a)2 of the Act, it will be necessary for us to inspect sales invoices and accounts receivable for a representative period of at least 12 months and payroll records from October 24, 1938 to the present date.

At this point in the investigation it is impossible to state the exact records necessary to establish the facts in the case and it is imperative that we be immediately advised as to your intentions regarding the making available of such records as may be deemed necessary.

Very truly yours,

CLIFFORD C. WILLS

Clifford C. Wills

ELBERT SHAW

Inspectors [17]

## EXHIBIT "C"

## AFFIDAVIT OF HOWARD E. HILBUN

State of Idaho,  
County of Ada—ss.

Howard E. Hilbun, being duly sworn, deposes and says:

I am a resident of Boise, County of Ada, State of Idaho. I am a Senior Inspector in the Wage and Hour Division, United States Department of Labor, stationed in Boise, Idaho.

To keep the appointment made by Mr. C. H. Detweiler, President of the company, and Inspector Elbert Shaw for an examination of the company's records, to be made in the presence of Mr. Eli A. Weston, at the offices of the company in Twin Falls, Idaho, on December 1, 1943, accompanied by Inspector Clifford C. Wills of the Wage and Hour Division, United States Department of Labor, I called at the offices of the company on December 1, 1943 and requested permission to examine the records of Detweiler Bros., Inc. of Mr. C. H. Detweiler, President of the company. These records were refused us.

At 10:00 A.M., on August 18, 1944, I, as an officer designated by the Administrator in the subpoena duces tecum served on Detweiler Bros., Inc., was present at the Rogerson Hotel, Twin Falls, Idaho, for the purpose of taking testimony and examining and copying the books, papers and documents which said subpoena duces tecum required

Detweiler Bros., Inc. to produce at said time and place, but the company failed and refused to produce said documentary evidence of any part thereof, although R. P. Parry, one of the company's attorneys, did appear at the time and place specified in the subpoena and stated that it was the company's intention not to appear or to produce the books, papers and documents specified in the said subpoena.

HOWARD E. HILBUN

Howard E. Hilbun

Subscribed and Sworn to before me this 3 day of Oct., 1944. [19]

[Seal]

HARRY W. POULSON

Notary Public in and for the County of Ada, State of Idaho. [20]

### EXHIBIT "D"

### AFFIDAVIT OF ADRIAN ROBERTS

State of Oregon,

County of Multnomah—ss.

Adrian Roberts, being duly sworn, deposes and says:

I am a resident of Oak Grove, County of Clackamas, State of Oregon. I am a Supervising Inspector in the Wage and Hour Division, United States Department of Labor, stationed in Portland, Oregon.

On December 16, 1943, accompanied by Senior Inspector Howard E. Hilbun, I conferred with Mr. Eli A. Weston, one of the attorneys for Detweiler

Bros., Inc., in Boise, Idaho, and asked for permission to examine the company's records, pursuant to Section 11(c) of the Fair Labor Standards Act. Mr. Weston informed me that he would again consult with his client and would advise me by noon of December 18, 1943, whether the company would be willing to permit the Wage and Hour Division to examine its records. Mr. Weston and I agreed that unless I heard from him by noon of December 18, 1943, I could assume that Detweiler Bros., Inc. refused to permit the Wage and Hour Division to make an examination of its records, relating to interstate commerce, wages, hours, and other conditions of employment. No word was ever received from Mr. Weston by noon of December 18, 1943, or thereafter.

ADRIAN ROBERTS

Adrian Roberts

Subscribed and Sworn To before me this 26th day of September, 1944.

[Seal]                      NAN FRISBEE

Notary Public in and for the County of Multnomah, State of Oregon.

Notary Public in and for the State of Oregon. My commission expires January 7, 1947. [21]



EXHIBIT "E"

United States of America  
Department of Labor  
Wage and Hour Division

SUBPENA DUCES TECUM

To Detweiler Bros., Inc., 144 Second Avenue,  
North, Twin Falls, Idaho

At the instance of the Administrator, Wage and Hour Division, Department of Labor, you are hereby required to appear before Howard E. Hilbun or Clifford C. Wills, Inspectors, or Karl M. Rodman, Attorney, or any of them, of the Wage and Hour Division, Department of Labor, at Rogerson Hotel, 157 Main Avenue East in the City of Twin Falls, Idaho on the 18th day of August, 1944, at 10:00 o'clock a.m. of that day, to testify In the Matter of Detweiler Bros., Inc., a Corporation involving an investigation pursuant to the provisions of Sections 9 and 11(a) of the Fair Labor Standards Act of 1938, of complaints of violations by the said Corporation of Sections 7(a), 11(c), 15(a)(1), 15(a)(2) and 15(a)(5) of the said Act.

And you are hereby required to bring with you and produce at said time and place the following books, papers, and documents:

(1) Any and all books and records which record the wages paid to your employees during the period from October 24, 1940, to date.

(2) Any and all books, documents, time cards, time sheets, papers or memoranda made or kept

by you which record the hours worked each work-day and each workweek by your said employees during the period from October 24, 1940, to date.

(3) Any and all books, records, documents, receiving slips, invoices or memoranda of purchase and shipments received by you from points outside the State of Idaho during the period from October 24, 1940, to date.

(4) Any and all invoices, shipping receipts, copies of bills of lading or other documents, records or memoranda pertaining to goods sold, shipped, delivered, transported or offered for transportation from your establishment in Twin Falls, Idaho, during the period from October 24, 1940, to date.

Fail Not At Your Peril

In testimony whereof, the seal of the Department of [22] Labor is affixed hereto, and the undersigned, the Administrator of the Wage and Hour Division of said Department of Labor, has hereunto set his hand at New York this 17 day of July, 1944.

L. METCALFE WALLING

### RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was

Duly served (Indicate by check method used.) in person. ☒ by leaving at principal office or place of business, to wit:



on the person named herein on July 28, 1944,  
(Month, day, year)

EARLE B. WILLIAMS

(Name of person making  
service)

Deputy U. S. Marshal  
(Official title)

I certify that the person named herein was in attendance as a witness at ..... on (Month, day or days, and year). (Name of person certifying). (Official title).

[Endorsed]: Filed Oct. 6, 1944. [23]

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[Title of District Court and Cause.]

### ORDER TO SHOW CAUSE

Upon the petition of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, duly verified the 6th day of October, 1944, and filed herein on the 6th day of October, 1944, and the exhibits annexed thereto, it is hereby

Ordered that respondent, Detweiler Bros., Inc., show cause, if there *by* any, before this Court, in the United States Court House, the Federal Building, Pocatello, Idaho, on the 18th day of October, 1944, at 10 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, why an order of this Court should not issue requiring said respondent to appear before L. Metcalfe Wall-

ing, Administrator of the Wage and Hour Division, United States Department of Labor, or an officer of the Wage and Hour Division, designated by him, at such time and place as this Court may determine, and there to produce the following books, papers, documents and records:

1. Any and all books and records which record the wages paid to your employees during the period from October 24, 1940, to date.

2. Any and all books, documents, time cards, time sheets, papers or memoranda made or kept by you which record the hours worked each workday and each workweek by your said employees during the period from October 24, 1940, to date.

3. Any and all books, records, documents, receiving slips, invoices or memoranda of purchases and shipments received by you from points outside the State of Idaho during the period from October 24, 1940, to date.

4. Any and all invoices, shipping receipts, copies of bills of lading or other documents, records or memoranda pertaining to goods sold, shipped, delivered, transported or offered for transportation from your establishment in Twin Falls, Idaho, during the period from October 24, 1940, to date.

And to give evidence as required by a subpoena duces tecum of the Administrator of the Wage and Hour Division which was duly served upon respondent in connection with the investigation of the said Detweiler Bros., Inc., pursuant to Section 9 [24] and 11(a) of the Fair Labor Standards Act, 1938, (52 Stat. 1060); and it is

Further Ordered that service of a copy of this Order to Show Cause, together with copy of said petition of L. Metcalfe Walling, be made upon respondent on or before the 9th day of October 1944, and that such service be deemed sufficient service.

Dated: Oct 6th 1944.

CHASE A. CLARK

United States District Judge.

Attest:

[Seal]

W. D. McREYNOLDS

Clerk

## RETURN ON SERVICE OF WRIT

United States of America,

District of Idaho—ss.

I hereby certify and return that I served the annexed Order to Show Cause, together with Pition of L. Metcalfe Walling on the therein-named Detweiler Brothers, a corporation by handing to and leaving a true and correct copy thereof with George Detweiler, Secretary of the Detweiler Bros. Corporation personally at Twin Falls, Idaho in said District on the 9th day of Oct. 1944, 19...

ED M. BRYAN

U. S. Marshal

By DAVE NICHOLS

Deputy

[Endorsed]: Filed Oct. 13, 1944. [25]

[Title of District Court and Cause].

## ANSWER TO APPLICATION

Comes Now The Respondent above named and for its Answer to the Application To Compel Respondent To Attend, Testify and Produce Documentary Evidence shows the Court as follows:

### 1.

Respondent represents to the Court that the so-called Application herein fails to state facts sufficient to constitute a cause of action in favor of the Petitioner and against the Respondent or any facts sufficient to constitute a cause of action in favor of the Petitioner and against the Respondent or any facts which entitles the Petitioner to the relief sought herein.

### 2.

That the so-called Application herein fails to state any facts which would give this Court jurisdiction to grant the relief asked for in said Application and it appears on the face of the said Application that the Court does not have jurisdiction to grant the relief sought.

### 3.

Answering Paragraph I of the Application, Respondent admits the allegations thereof except only that it denies that the Administrator, or his designated representatives are empowered by Section 11(a) of the Act to investigate, enter and inspect all places and all records, and in particu-

lar to investigate, enter and inspect respondent's place of business and Respondent's records, whenever the Administrator may deem it necessary or appropriate to determine whether any person has violated any provision of the Act, or which may aid in the enforcement of the provisions of the Act; and further denies that the Administrator has the power to issue and cause to be served upon any person a subpoena requiring the attendance and testimony of witnesses and the production of all documentary evidence relating to any matter under investigation, and in particular denies that the Administrator has the power to issue and cause to be served upon Respondent a subpoena requiring the attendance [26] and testimony of witnesses and the production of all documentary evidence relating to any matter under investigation.

4.

Answering Paragraph II of the Application, Respondent admits the existence of the statutes therein referred to but alleges that under the facts and circumstances present in this matter and upon the face of the Application herein this Court does not have the jurisdiction to grant the relief prayed for and alleges that under the facts and circumstances present in this matter and upon the face of the Application herein this Court does not have jurisdiction either over the person of the Respondent or the subject matter to grant the relief sought in the Application.

5.

Answering Paragraph III of the Application, Respondent admits the allegations thereof.

6.

Answering Paragraph IV of the Application, Respondent admits the allegations thereof.

7.

Answering Paragraph V of the Application, Respondent admits that it is in the business of purchasing, selling and installing sheet metal and heating supplies but alleges that the said acts and all of them are done solely in connection with its retail service establishment; denies that it is engaged in the business of manufacturing, producing or shipping plumbing, sheet metal and heating supplies; and denies that in connection with such purchase, sale and installation, or in connection with anything whatsoever or at all that is done by it, that it is engaged in the production of goods for interstate commerce; and denies that it is engaged in interstate commerce within the meaning of the Fair Labor Standards Act of 1938.

That Respondent's place of business is a retail store on Second Avenue North in the business district of Twin Falls, Idaho: that Respondent's principal business is the sale, at retail, of household appliances in and about the City of Twin Falls [27] which is a city of about eleven thousand population; and that in connection with its business, Respondent operates in the back end of its place of business a plumbing shop such as is usual and



customary in retail establishments in such small cities, and does only such plumbing work as may be incidental to the installation of appliances sold by it, or upon call from retail customers, or in connection with the construction of new buildings in and around Twin Falls; and that likewise it operates in the rear of its store a shop where sheet metal work can be done and does for retail customers such sheet metal work as may be incidental to the installation of furnaces or other household appliances, or upon call from retail customers, or in new construction work for retail customers.

That the only purchasing done by it is the purchasing, in the usual course of business, of articles for resale by it at retail to its retail customers; that it does not do any manufacturing or producing; except only if said words be deemed to include doing sheet metal work for installation for retail customers which is the only work of such character done by Respondent; that all of its sales are at retail and that it makes no wholesale sales whatsoever; that all installations are done for the ultimate retail customer; that it is not engaged in shipping anything unless such word would include the transportation of material from Respondent's store to the place of use by the ultimate retail consumer.

That all of Respondent's sales are made, and all services performed by Respondent, solely within the State of Idaho and that Respondent does not make sales or perform services in any other state.



## 8.

Answering Paragraph VI of the so-called Application, Respondent denies that Petitioner has reasonable grounds or any grounds whatsoever for believing that Respondent has violated the statutory sections therein cited and admits the remaining allegations thereof and alleges that no facts have been asserted which would give to Petitioner, and Petitioner could not have, [28] any grounds for believing that Respondent was within the terms of the statutes cited or could be guilty of any violation thereof.

## 9.

Answering Paragraph VII of the so-called Application, Respondent admits the allegations thereof.

## 10.

Answering Paragraph VII of the so-called Application, Respondent admits the allegations thereof.

## 11.

Answering Paragraph IX of said Application, Respondent admits the allegations therein contained and alleges that it explained its refusal to obey said Subpoena by a letter from its Attorney, a copy of which is hereto attached marked Exhibit 1, and by reference made a part hereof.

## 12.

Respondent denies each and all and every of the allegations of Paragraph X.

13.

Answering Paragraph XI of the so-called Application, Respondent admits the allegations thereof.

14.

Respondent denies each and all and every of the allegations of Paragraph XII.

15.

Answering Paragraph XIII of the so-called Application, Respondent admits the allegations thereof.

Wherefore, Having fully answered the Application herein, Respondent prays the Court for an Order dismissing the said Application and denying the Petitioner any relief herein and that Respondent may have such other and further relief as may be necessary and proper.

PARRY & THOMAN

R. P. PARRY

J. P. THOMAN

Attorneys for Respondent,  
Residing at Twin Falls,  
Idaho. [29]

State of Idaho,  
County of Bannock—ss.

R. P. Parry, being first duly sworn, deposes and says:

That he has read the foregoing Answer to Application and verily believes the same to be true, and that he makes this verification for the reason

that at this time all of the officers of the Respondent are outside of the County wherein this affiant resides and this verification is made.

R. P. PARRY

Subscribed and Sworn to before me this 8th day of October, 1944.

[Seal]

O. R. BAUM

Notary Public, Residing at  
Pocatello, Idaho [30]

EXHIBIT No. 1

August 14, 1944.

Mr. Howard E. Hilbun  
Wage and Hour Division  
Department of Labor  
Boise, Idaho.

Re: Detweiler Bros., Inc.

Wage and Hour Division Subpoena  
Duces Tecum. Our No. 5034-D.

My dear Mr. Hilbun:

Our clients, Detweiler Bros., Inc. have shown us a Subpoena Duces Tecum issued by Mr. Walling in New York on July 17, 1944, commanding them to present to you or to other named persons all their books and records at 10 A. M. on August 18, at the Rogerson Hotel in Twin Falls, Idaho.

From the facts made available to us in our investigation of the law, it is our opinion that Detweiler Bros., Inc., are not subject to the provisions of the Act referred to in the Subpoena and that consequently the Subpoena Duces Tecum in ques-

tion has no validity, force or effect. This client's business is simply a small town retail and service establishment, doing a strictly intrastate business. It is for these reasons that we express the above opinion.

Accordingly, this letter is to advise you that our client will not obey the Subpoena and we will not have the records available at the time and place indicated. We are advising in advance in order to save your Department the time and money of making an unnecessary appearance at this time and place.

You realize that our client's attitude is not one of captiousness or arbitrary defiance. It is simply our thought that we are entitled to an orderly decision upon the question of whether or not the Act applies to our clients, in advance of any lengthy inspection of all of the voluminous books and records so sweepingly referred to in the Subpoena.

We are, of course, willing to review this matter further and consider giving our client different advice in the premises if you can show us that the Act does apply to our client and that as a matter of law it is obligated to obey the Subpoena. We would be willing to carefully consider anything you have to offer on this subject.

Yours very truly,

PARRY AND THOMAN

By R. P. PARRY

RPP:EF

[Endorsed]: Filed Oct. 18, 1944. [31]

[Title of District Court and Cause.]

### AFFIDAVIT

State of Idaho

County of Twin Falls—ss.

George Detweiler, being first duly sworn, deposes and says:

That he is the Secretary of the Respondent corporation and as such is familiar with the matters and things herein set forth;

That said Respondent is purely a retail service organization and nothing more, operating a retail store in downtown Twin Falls wherein it sells principally household appliances; and that in connection therewith, it has developed a general retail plumbing business and a general retail sheet metal department;

That its purchases are limited solely to purchasing those things which it sells at retail to the ultimate consumer; that its selling is limited solely to retail selling and it does no wholesale business whatsoever; and that its installing is done solely for the ultimate retail consumer;

That all of its business is done in Twin Falls, Idaho, or in the trade area immediately around Twin Falls area and all of it in the State of Idaho; it does no business in any other state whatsoever.

That it does no manufacturing or producing of any of the finished products which it sells; that its sheet metal work is of course fabrication work but all such work done by the Respondent is specific work for specific jobs of installation for specific

retail customers, and it does not manufacture in any sense any object for sale as such but does work only for installation in specific places and in specific buildings and in connection with its business, principally the installation of furnaces. [32]

That Respondent is not engaged in transportation in any sense whatsoever unless such work would cover the movement by its trucks of goods to the home or building of its retail customers and that it does no other transportation of any kind.

That the books and records requested in the Subpena Duces Tecum served herein would of necessity be voluminous in that many of the sales at Respondent's store are for as little as Fifty Cents or One Dollar, and to bring in all records of sales made by the Respondent in such retail business would require the production of many records and involve the loss of much manpower at a critical time, and involve much work; and likewise all of the other records asked for by the Subpena which relate solely to intra-state business are voluminous and lengthy; and that to have answered the Subpena would have meant the production of at least a truck load of books and records in the lobby of the hotel at the specified time.

That Respondent is now so short of manpower that it cannot answer calls for plumbers and repair men sufficient to attend to the sanitation needs of the community, and that at this time to take the time of the managing officers or of assistants on a fishing expedition to go through this whole mass of



records would be decidedly contrary to the war effort.

GEO. H. DETWEILER

Subscribed and Sworn to before me this 17th day of October, 1944.

J. R. KEENAN

Notary Public, Twin Falls,  
Idaho.

[Endorsed]: Filed Oct. 18, 1944. [33]

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[Title of District Court and Cause.]

REQUEST FOR PERMISSION TO FILE  
SUPPLEMENTAL AFFIDAVIT

Comes Now the Respondent in the above entitled action prior to the final submission of the matter and requests the Court for permission to file a Supplemental Affidavit therein to be considered along with and as a part of the Affidavit already filed by Respondent.

Dated this 19th day of October, 1944.

PARRY & THOMAN

R. P. PARRY

Attorneys for Respondent  
Residence and P. O. Address:  
Twin Falls, Idaho.



ORDER

Permission to file Supplemental Affidavit as above requested is hereby granted.

Dated this 23d day of October, 1944.

CHASE A. CLARK

District Judge

[Endorsed]: Filed Oct. 23, 1944. [34]

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[Title of District Court and Cause.]

SUPPLEMENTAL AFFIDAVIT

George Detweiler, being first duly sworn, deposes and says:

That he makes this Affidavit as supplemental to and to be considered with his Affidavit of October 17, 1944, and on file herein.

That in said Affidavit he was referring only to those matters and things raised by the petition herein, namely, the plumbing and sheet metal work done by Respondent; that in order that the Court may not be in any way misled, he desires to state that in stating that Respondent is not engaged in manufacturing, he wants to make it clear that this is true unless said word includes certain other service work done for the retail consumer by Respondent in connection with its retail service business of insulating homes. That in this connection, Respondent purchases diatomaceous earth in Idaho which it mixes by machine with paper, places in sacks and in turn sells it to and installs it in the attic and

walls of the buildings of the ultimate retail consumer; that in no case does it sell to a middleman who in turn makes the installations; that in no case does it sell it for resale, and all such sales and installations are made in the State of Idaho in its immediate trade area; that Respondent does not consider this as manufacturing, but only as one incident in its retail service.

Also Respondent states that of course a large percentage of the household appliances sold by it in its Twin Falls store to the retail consumers are by it received from outside the State of Idaho.

GEO. H. DETWEILER

Subscribed and Sworn to before me this 19th day of October, 1944.

[Seal]

J. R. KEENAN

Notary Public, residing at  
Twin Falls, Idaho.

[Endorsed]: Filed Oct. 23, 1944. [35]

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[Title of District Court and Cause.]

REQUEST FOR PERMISSION TO FILE  
SUPPLEMENTAL AFFIDAVIT

Petitioner in the above entitled action prior to the final submission of the matter requests this Court's permission to file a Supplemental Affidavit herein to be considered along with and as part of the petition and exhibits already filed by Petitioner.

Dated this 4th day of December, 1944.

DOUGLAS B. MAGGS

Solicitor

ARCHIBALD COX

Associate Solicitor

DOROTHY M. WILLIAMS

Regional Attorney

KARL M. RODMAN

Attorney

United States Department of  
Labor

JOHN A. CARVER

United States Attorney

By E. H. CASTERLIN

Assistant United States  
Attorney

United States Department of  
Justice

Attorneys for Petitioner

[Endorsed]: Filed Dec. 4, 1944. [36]

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[Title of District Court and Cause.]

### ORDER

Permission to file Supplemental Affidavit as requested in Petitioner's motion of December 4th, 1944, is hereby granted.

Dated this 4th day of December, 1944.

CHASE A. CLARK

District Judge

[Endorsed]: Filed Dec. 4, 1944. [37]

[Title of District Court and Cause.]

AFFIDAVIT

State of Idaho

County of Ada—ss.

Howard E. Hilbun, being first duly sworn, deposes and says:

That he is a Senior Inspector in the Wage and Hour Division, United States Department of Labor; that he is the Inspector in Charge of the Boise Field office of the said Wage and Hour Division. That the conversations with the officers and attorneys of the Respondent and visits to the establishment of the Respondent set forth in the Administrator's petition and exhibits heretofore filed in this case were had with and made by himself and inspectors of the Wage and Hour Division attached to the Boise office and under his direction and supervision.

That he has been informed and believes that the Respondent normally maintains a stock of electrical and other appliances which it receives from points out of state and which it installs and services in industrial and commercial firms within the State of Idaho; that it is engaged in tin and sheet metal work for various types of industries including seed houses, flour mills, and creameries. That a portion of the floor space at Respondent's establishment is devoted to the manufacture of insulation material composed of shredded paper and quarried diatomaceous earth and that some of this material is sold to commercial and industrial users both within and without the State of Idaho.

That respondent engages in the manufacture and installation of plumbing and heating systems in commercial and industrial firms and also engages in servicing these plumbing and heating systems after they have been installed.

That respondent maintains a parts department which [38] constantly receives plumbing, heating, and refrigeration parts coming from out of state points and which are used by its plumbing, heating and other departments in installing and servicing plumbing and heating systems in commercial and industrial firms.

That many employees of the respondent from time to time engage in a variety of the activities performed by the respondent during the course of their regular work weeks.

HOWARD E. HILBUN

Subscribed and Sworn to before me this 4th day of December, 1944. Notary Public in and for the County of Ada, State of Idaho.

[Seal]

KENNETH CONOVER

Notary Public

My commission expires Feb. 19, 1948.

[Endorsed]: Filed Dec. 4, 1944. [39]

[Title of District Court and Cause.]

REQUEST FOR PERMISSION TO FILE  
SUPPLEMENTAL AFFIDAVIT

Comes Now the Respondent in the above entitled action prior to the final submission of the matter, and requests the Court for permission to file an Affidavit as supplemental to and to be considered with his Supplemental Affidavit of October 19th, 1944 and his Affidavit of October 17th, 1944.

Dated this 13th day of December, 1944.

PARRY & THOMAN

R. P. PARRY

Attorneys for Respondent

Residence and P. O. Address:

Twin Falls, Idaho

ORDER

Permission to file Supplemental Affidavit as above requested is hereby granted.

CHASE A. CLARK

District Judge

[Endorsed]: Filed Dec. 15, 1944. [40]

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[Title of District Court and Cause.]

SUPPLEMENTAL AFFIDAVIT

State of Idaho

County of Twin Falls—ss.

George H. Detweiler, being first duly sworn, deposes and says:

That he makes this Affidavit as supplemental to and to be considered with his Supplemental Affidavit of October 19th, and his Affidavit of October 17th, 1944, and on file herein, and in answer to the Affidavit of Howard E. Hilbun.

That all of Respondent's sales are unit sales to the ultimate consumer and are made within the State of Idaho; that by unit sales, affiant means sales of a single item to the ultimate consumer or sales of small quantities of items to the ultimate consumer, and in no case does Respondent make sales of items in wholesale numbers to the ultimate consumer, or to anyone.

GEO. H. DETWEILER

Subscribed and Sworn to before me this 13th day of December, 1944.

[Seal]

J. R. KEENAN

Notary Public,

Residing at Twin Falls, Idaho

[Endorsed]: Filed Dec. 15, 1944. [41]



[Title of District Court and Cause.]

Douglas B. Maggs,

Archibald Cox,

Dorothy M. Williams,

Karl M. Rodman,

Attorneys for the Petitioner, Address, c/o  
Wage & Hour Division U. S. Department of  
Labor, 402 Federal Building, Boise, Idaho.

Messrs Parry & Thomas, Twin Falls, Idaho,  
Attorneys for Respondent.

December 29, 1944

### OPINION

Clark, District Judge.

This matter is before the Court on the petition of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the provisions of the Fair Labor Standards Act of 1938 (c) 676, 52 Stat. 1069; 29 USCA Section 201, applying to the Court for an order directing Detweiler Brothers Incorporated, respondent herein, to appear before the administrator or his representative and produce documentary evidence and give testimony as required by a subpoena duces tecum issued by the Administrator on the 17th day of July 1944.

Order to show cause was issued by this Court and at the time and place fixed by said order, the respondent appeared and answered the application and denied that the administrator or his designated representative is empowered to enter and inspect

its records or their place of business or that the administrator has power to issue and cause to be served upon respondent a subpoena requiring the attendance and testimony of witnesses and the production of all documentary evidence relating to its business, for the reason that it is [42] a retail establishment and all the services performed by it are solely within the State of Idaho.

On the date of the hearing on the order to show cause, the respondent filed a positive affidavit and later filed a supplemental affidavit, positively stating that they are a retail establishment and not within the Act, doing business solely within the State of Idaho. The affidavit of the administrator is on information and belief. The weight of the affidavits are in favor of the respondent as its affidavits are positive and the affidavit of the Administrator, as hereinbefore stated, is on information and belief.

The administrator contends that regardless of the fact that the respondent claims its establishment is one that is exempt as a retail establishment within the meaning of the Fair Labor Standards Act, that this is not an issue in the present hearing and that all that is required of the Administrator is to inform the Court, on information and belief that he has reason to believe that the respondent is within the Act, and that the Court has no discretion in the matter but to issue the order requiring the respondent to obey the subpoena of the Administrator.

The question, stated in a more concrete form, is whether or not the Administrator has the absolute right to examine the books and records in question

so that it can be determined whether there is a violation of the Fair Labor Standards Act.

The great weight of authority answers this in the affirmative. There is some authority that takes a contrary view. The Ninth Circuit Court of Appeals has not passed upon the question. However, the Supreme Court of the United States in the case of *Endicott Johnson Corporation v. Perkins*, Secretary of Labor, 317 U.S. 501 seems to be controlling on this question and has been cited as controlling by the Circuit Court of Appeals of the First Circuit in the case of *Martin Typewriter Company v. Walling*, 135 Fed (2d) 918.

In the *Endicott Johnson v. Perkins* case (*supra*) referring to the powers of the Secretary of Labor the Court said: \* \* \* The evi- [43] dence sought by the subpoena was not plainly incompetent or irrelevant to any lawful purpose of the Secretary in the discharge of her duties under the Act, and it was the duty of the District Court to order its production for the Secretary's consideration."

Counsel for respondent asks why is it necessary for the Administrator to apply to the Federal Court for an enforcement Order if the Court is without authority or power to hear the matter and determine whether or not the respondent is covered by the Act? For what purpose did Congress provide the jurisdiction is conferred on the District Courts of the United States to act on the petition of the Administrator to require obedience of his subpoena?

After a careful study of the case of *Endicott Johnson v. Perkins*, *Supra.*, (in that no other

remedy is provided the Administrator to enforce his subpoena) I am convinced the only purpose of the hearing before this Court is to obtain an order, the disobedience of which would place the respondent in contempt of this Court's authority, and it is the conclusion of this Court that such an order should issue.

The Order will be prepared by the attorneys for the petitioner in accordance with this opinion, a copy to be served on counsel for respondent. The original will be submitted to the Court for approval.

[Endorsed]: Filed Dec. 30, 1944. [44]

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[Title of District Court and Cause.]

### ORDER

Application having been made by petitioner, L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, for an order directing respondent to appear before petitioner, or one of the officers designated by him, at such time and place as this Court may order, and there to produce certain books, records, papers and documents and give evidence as required by the subpoena duces tecum issued by petitioner and served upon respondent in connection with an investigation of respondent pursuant to sections 9 and 11(a) of the Fair Labor Standards Act of 1938; an order having been issued, upon said application, directing respondent to appear before this Court

to show cause why it should not be ordered to comply with said subpoena duces tecum; the order to show cause having been duly served upon respondent, and respondent having filed an answer to petitioner's application and appeared in response to the order to show cause;

Whereupon, after hearing and consideration of the application, answer, affidavits of both parties, briefs and arguments of counsel, and it appearing that this Court has jurisdiction to enforce said administrative subpoena, it is, by the Court

Ordered that respondent, Detweiler Bros., Inc., do appear before petitioner, or Howard E. Hilbun, Elbert Shaw, and Karl M. Rodman, officers duly designated by petitioner, at 10 AM o'clock on January 22, 1945, at the jury room, Twin Falls County Courthouse, Twin Falls, Idaho, and there produce the following books, records, papers and documents, and give evidence relating thereto, as is required by the aforesaid subpoena duces tecum of the Administrator of the Wage and Hour Division, to wit:

(1) Any and all books and records which record the wages paid to your employees during the period from October 24, 1940, to date. [45]

(2) Any and all books, documents, time cards, time sheets, papers or memoranda made or kept by you which record the hours worked each workday and workweek by your said employees during the period from October 24, 1940, to date.

(3) Any and all books, records, documents, receiving slips, invoices or memoranda of purchase

and shipments received by you from points outside the state of Idaho during the period from October 24, 1940, to date.

(4) Any and all invoices, shipping receipts, copies of bills of lading or other documents, records or memoranda pertaining to goods sold, shipped, delivered, transported or offered for transportation from your establishment in Twin Falls, Idaho, during the period from October 24, 1940, to date.

Jurisdiction of this matter is retained for the purpose of giving full effect to this order and of making such other and further orders or taking such other action, if any, as may become necessary or appropriate to carry out and enforce this order.

Dated: January 16th, 1945.

CHASE A. CLARK

United States District Judge.

[Endorsed]: Filed Jan. 16, 1945. [46]

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that Detweiler Bros., Inc., a corporation, Respondent above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Order directing Respondent to obey a subpoena duces tecum issued to it by Petitioner above named, entered in this action on the 11th day of January, 1945.



Dated January 16th, 1945.

PARRY AND THOMAN

R. P. PARRY

J. P. THOMAN

Attorneys for Respondent

Residence: Twin Falls, Idaho.

[Endorsed]: Filed Jan. 16, 1945. [47]

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[Title of District Court and Cause.]

### MOTION FOR SUPERSEDEAS

Respondent moves the Court to stay the enforcement of the Order in this action pending the disposition of Respondent's appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and for that purpose to fix the amount of the bond required to be filed by Respondent, and fix time within which said bond shall be filed.

PARRY AND THOMAN

R. P. PARRY

J. P. THOMAN

[Endorsed]: Filed Jan. 16, 1945. [48]

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[Title of District Court and Cause.]

### ORDER GRANTING SUPERSEDEAS

This cause came on to be heard on motion of respondent for a stay pending Respondent's appeal to the United States Circuit Court of Appeals for



the Ninth Circuit, and it appearing to the Court that Respondent is entitled to such a stay,

It Is Ordered that the execution of any proceedings to enforce the order entered herein on the 16th day of January, 1945, be stayed pending the determination of Respondent's appeal from such Order, upon the filing by Respondent and approval by this Court of a bond in the sum of \$500.00, and that Respondent is given until January 22, 1945 in which to file sale bond on appeal.

Dated this 16th day of January, 1945.

CHASE A. CLARK

District Judge.

[Endorsed]: Filed Jan. 16, 1945. [49]

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[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men By These Presents:

That Detweiler Bros., Inc., a corporation, as principal, and Hartford Accident and Indemnity Company, a corporation authorized to transact surety business in the State of Idaho, as surety, are held and firmly bound unto Petitioner above named in the full and just sum of Five Hundred Dollars (\$500.00) to be paid to the said Petitioner, his successors, executors, administrators and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 19th day of January, 1945.

Whereas, on the 16th day of January, 1945, in an action pending in the United States District Court for the Southern District of the State of Idaho, between L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, as Petitioner, and Detweiler Bros., Inc., a corporation, as Respondent, an order was rendered against the said Respondent and the said Respondent having filed a Notice of Appeal from such Order [50] to the United States Circuit Court of Appeals for the Ninth Circuit;

Now, the condition of this obligation is such, that if the said Respondent shall prosecute its appeal to completion and shall satisfy the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed, or if the judgment is affirmed, or shall satisfy in full such modification of the judgment and such costs, interest and damages as the said Circuit Court of Appeals may adjudge and award, then this obligation to be void; otherwise to remain in full force and effect.

In Witness Whereof, the undersigned corporations have caused this instrument to be executed in their names by their respective officers or agents, all duly authorized in the premises.

[Seal]

DETWEILER BROS. INC.

a corporation

By C. H. DETWEILER

Its President

Countersigned:

[Seal]

PAUL R. FABER,

Agent

Twin Falls, Idaho

HARTFORD ACCIDENT AND

INDEMNITY COMPANY,

a corporation

By PAUL R. FABER

Its Attorney-in-fact

The above and foregoing bond is accepted and approved this 22nd day of January, 1945.

CHASE A. CLARK

U. S. Federal Judge

[Endorsed]: Filed Jan. 22, 1945. [51]

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[Title of District Court and Cause.]

### DESIGNATION OF RECORD

Appellant designates the following portions of the record, proceedings, and evidence to be contained in the record on appeal in this action:

1. Subpoena duces tecum issued July 17, 1944.
2. Application to Compel Respondent to Attend, Testify and Produce Documentary Evidence, and
  - a. Exhibit "A"
  - b. Exhibit "B"
  - c. Exhibit "C"
  - d. Exhibit "D"
3. Order to Show Cause.

4. Answer to Application, and
  - a. Exhibit 1
5. Affidavit of George Detweiler.
6. Request by Respondent to File Supplementary Affidavit.
7. Supplemental Affidavit of George Detweiler.
8. Order Granting Permission to File Supplemental Affidavit of George Detweiler.
9. Petitioner's Request for Permission to File Supplemental Affidavit.
10. Order Granting Petitioner Permission to File Supplemental Affidavit.
11. Affidavit of Howard E. Hilbun.
12. Respondent's Request for Permission to File Second Supplemental Affidavit of George Detweiler.
13. Order granting Respondent's Request for Permission to File Second Supplemental Affidavit of George Detweiler.
14. Second Supplemental Affidavit of George Detweiler.
15. Opinion of District Court. [52]
16. Order.
17. Notice of Appeal.
18. Motion for Supersedeas.
19. Order Granting Supersedeas.
20. Supersedeas Bond.
21. Designation of Record.

Dated this 23rd day of January, 1945.

Respectfully submitted,

PARRY & THOMAN

R. P. PARRY

J. P. THOMAN

Attorneys for Respondent & Appellant, Detweiler  
Bros. Inc. Residence: Twin Falls, Idaho.

[Endorsed] Filed Jan. 25, 1945. [53]

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[Title of District Court and Cause.]

#### CERTIFICATE OF COUNSEL

I, R. P. Parry, one of the attorneys for Respondent and Appellant in the above-entitled action, hereby certify that on the 26th day of January, 1945, I served the attached Designation of Record upon Douglas B. Maggs, Solicitor for Petitioner, Archibald Cox, Associate Solicitor for Petitioner, Dorothy M. Williams, Regional Attorney for Petitioner, Karl M. Rodman, Attorney for Petitioner, Charles H. Elrey, Branch Manager, Wage Hour Division, and Howard E. Hilbun, Sr. Inspector-in-Charge, Wage Hour Division, and each of them, by depositing a copy in the United States mails, postpaid, addressed to said Douglas B. Maggs, Archibald Cox, Dorothy M. Williams, Karl M. Rodman, and Charles H. Elrey, at 208 U. S. Court House, Old, c/o Wage and Hour Division, U. S. Department of Labor, Portland, 4, Oregon, and addressed to Howard E. Hilbun at 402 Federal

Building, c/o Wage and Hour Division, Boise, Idaho.

Dated: January 26, 1945.

R. P. PARRY

R. P. Parry, one of the attorneys for Respondent and Appellant.

(Copy of Designation of Record attached.)

[Endorsed]: Filed Jan. 29, 1945. [54]

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK OF UNITED  
STATES DISTRICT COURT TO TRAN-  
SCRIPT OF RECORD

United States of America,  
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify the foregoing typewritten pages numbered 1 to 54, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal thereon in the United States Circuit Court of Appeals for the Ninth Circuit, in accord with designation of contents of record on appeal of the appellant, as the same remain on file and of record in the office of the Clerk of said District Court, and that the same constitutes the record on the appeal to the United

States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record amount to the sum of \$18.35, and that the same have been paid in full by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this 12th day of February, 1945.

[Seal]                      ED. M. BRYAN  
Clerk. [55]

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[Endorsed]: No. 10988. United States Circuit Court of Appeals for the Ninth Circuit. Detweiler Bros., Inc., a corporation, Appellant, vs. L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Idaho, Southern Division.

Filed February 14, 1945.

PAUL P. O'BRIEN  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.



In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 10988

L. METCALFE WALLING, ADMINISTRATOR  
OF THE WAGE AND HOUR DIVISION,  
UNITED STATES DEPARTMENT OF  
LABOR,

Petitioner and Appellee,

vs.

DETWEILER BROS., INC., a corporation,  
Respondent and Appellant.

STATEMENT OF POINTS AND DESIG-  
NATION OF RECORD

STATEMENT OF POINTS

The points upon which appellant intends to rely on this appeal are as follows:

1. The Court erred in entering its order herein appealed from directing appellant to obey a subpoena duces tecum issued to it by appellee, for the reason that Appellant's establishment is one that is exempt as a retail service establishment within the meaning of the Fair Labor Standards Act.

2. The Court erred in entering its order herein appealed from directing appellant to obey a subpoena duces tecum issued to it by appellee, for the reason that Appellant is not engaged in commerce or in the production of goods for commerce within the meaning of the Fair Labor Standards Act, and is therefore exempt from the operation of the Fair Labor Standards Act.

3. The Court erred in entering its order herein appealed from directing appellant to obey a subpoena duces tecum issued to it by appellee, for the reason that the appellee, the Administrator of the Wage and Hour Division, did not show either (a) that appellant is not exempt as a retail service establishment within the meaning of the Fair Labor Standards Act, or (b) that appellant is engaged in commerce or in the production of goods for commerce within the meaning of the Fair Labor Standards Act.

4. The Court erred in holding that appellee, the Administrator of the Wage and Hour Division, "has the absolute right to examine the books and records in question so that it can be determined whether there is a violation of the Fair Labor Standards Act", and that "the only purpose of the hearing", wherein appellant was ordered to show cause why the subpoena duces tecum sought by appellee should not issue "is to obtain an order, the disobedience of which would place the respondent in contempt of this Court's Authority", for the reason

(a) that it violates the constitutional limitation on search and seizure (Fourth Amendment to U. S. Constitution), and

(b) relegates the Courts of the United States to subordinate agencies of administrative bureaus, and

(c) deprives the Courts of the United States from exercising any discretion at all in the premises, and

(d) is contrary to law, in that it is not provided in the Fair Labor Standards Act, and Congress never intended that the private papers and effects of *all* citizens and corporations of the United States should be subject to examination and inspection of the Administrator of the Wage and Hour Division.

### DESIGNATION OF RECORD

Appellant hereby designates the entire record on appeal to the Circuit Court of Appeals of the Ninth Circuit to be printed as certified by the Clerk of the United States District Court for the District of Idaho, Southern Division, and appellant also hereby designates this Statement of Points and Designation of Record to be printed.

Dated February 16, 1945.

Respectfully submitted,

PARRY & THOMAN

R. P. PARRY

J. P. THOMON

Attorneys for Respondent & Appellant, Detweiler Bros., Inc. Residence: Twin Falls, Idaho.

(Affidavit of Service Attached.)

[Endorsed]: Filed Feb. 19, 1945. Paul P. O'Brien, Clerk.